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Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. DEVINE, THERESA DEVINE,
and JOHN DEVINE,
a minor by and through his parents,
William J. Devine and Terry Devine,

Petitioners,

v.

INDIAN RIVER COUNTY SCHOOL BOARD,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 4, 1997

57 pp.

QUESTION PRESENTED

Do 28 U.S.C. § 1654 and the Individuals with Disabilities in Education Act ("IDEA") guarantee parents the right to proceed *pro se* in actions under the IDEA?

All parties to the proceeding below are listed in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 2
JURISDICTION 2
STATUTES INVOLVED 2
STATEMENT 2
REASONS FOR GRANTING THE WRIT 5
The Decision Below Departs from the Widespread Practice of Permitting Parents to Pursue IDEA Cases Pro Se, and Presents an Important Question of Federal Law Because It Threatens to Make It Impossible for Most Parents to Contest Inadequate State IDEA Rulings or Even to Defend Their IDEA Victories in Federal Court 5
CONCLUSION 14

APPENDIX
Opinion of the United States Court of Appeals for the Eleventh Circuit 1a
Transcript of Proceedings Before the United States District Court for the Southern District of Florida . . . 24a
Order on Counsel's Motion to Withdraw from the United States District Court for the Southern District of Florida 26a
20 U.S.C. §1415 . . . . . 27a

TABLE OF AUTHORITIES

CASES *Page*

Abney by Kantor v. District of Columbia, 849 F.2d 1491 (D.C. Cir. 1988) 8
Ahern v. Keene, 593 F. Supp. 902 10
Amman v. Stow School System, 982 F.2d 644 (1st Cir. 1992) 11
Amman v. Town of Stow, 991 F.2d 929 (1st Cir. 1993) 11
Arons v. New Jersey State Bd. of Educ., 842 F.2d 58 (3d Cir. 1988) 6
Beth V. by Yvonne V. v. Carroll, 87 F.3d 80 (3d Cir. 1996) 7
Burlington School Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985) 7
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 4
Collinsgru v. Palmyra Board of Education, No. 96-457 (JBS)(D.N.J. 1996), *appeal pending*, No. 96-5807 11
Greene by Greene v. Harrisville Sch. Dist., 771 F. Supp. 1 (D.N.H. 1990) 10
Gregory K. v. Longview Sch. Dist., 811 F.2d 1307 (9th Cir. 1987) 10
Hall by Hall v. Vance, 774 F.2d 629, (4th Cir. 1985) 8
Heiskell v. Mozie, 82 F.2d 861 (DCCA 1936) 9
Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 8,12
Honig v. Doe, 484 U.S. 305 (1988) 8
Jackson v. Franklin Cy. School Bd., 806 F.2d 623 (5th Cir. 1986) 7
Johnson by Johnson v. Duneland School Corp., 92 F.3d 554 (7th Cir. 1996) 8
Kay v. Ehrler, 499 U.S. 432 (1991) 8

Krehnbrink v. Maryland Dep't of Educ., 1995 U.S. App. LEXIS 36124 (4th Cir.) 10
Kruelle v. New Castle Cy. School Dist., 642 F.2d 687 (3d Cir. 1981) 10
Lawson v. Edwardsburg Public School, 751 F. Supp. 1257 (W.D. Mich. 1990) 11
Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990) 7
Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988), *rev'd*, 491 U.S. 223 (1989) 10
O'Reilly v. New York Times Co., 692 F.2d 863 (2d Cir. 1982) 9
Osei-Afriyie v. Medical College of Pennsylvania, 937 F.2d 876 (3d Cir. 1991) 11
Phillips v. Tobin, 548 F.2d 408 (2d Cir. 1976) 9
Rappaport v. Vance, 812 F. Supp. 609 (D. Md. 1993), *app. dism.*, 14 F.3d 596 (4th Cir. 1994) 8
Reshard v. Britt, 819 F.2d 1573 (11th Cir. 1987), *vacated pending en banc consideration*, 831 F.2d 222 *aff'd by equally divided court*, 839 F.2d 1499 (1988) . . 9
Rettig v. Kent City Sch. Dist., 788 F.2d 328 (6th Cir. 1986) 10
Rowland v. California Men's Colony, 506 U.S. 194 (1993) 9
Schreiber v. Ridgewood Bd. of Educ., 952 F. Supp. 205 (D.N.J. 1997) 10
Stellato v. Board of Education, 842 F. Supp. 1512 (N.D.N.Y. 1994) 10
Stemple v. Board of Educ. of Prince George's Cy., 623 F.2d 893 (4th Cir. 1980) 7,8
Straube v. Florida Union Free Sch. Dist., 778 F. Supp. 774 (S.D.N.Y. 1991) 10
Susan R.M. v. Northeast Independent School Dist., 818 F.2d 455 (5th Cir. 1987) 10
Town of Burlington v. Massachusetts Dep't of Education,

736 F.2d 773 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) 8
United States v. Reeves, 431 F.2d 1187 (9th Cir. 1970) . . . 9
Willheim v. Murchison, 206 F. Supp. 733 (S.D.N.Y. 1962), *app. dism.*, 312 F.2d 399 (2d Cir. 1963) 9

STATUTES, RULES, AND LEGISLATIVE MATERIALS

20 U.S.C. § 1400(b)(3) 6
20 U.S.C. § 1400(c) 6
20 U.S.C. § 1411 6
20 U.S.C. § 1412-1414 6
20 U.S.C. § 1412(a)(10)(C)(ii) 7
20 U.S.C. § 1415 2
20 U.S.C. § 1415(a) 6
20 U.S.C. § 1415(b)(1)(A) 6
20 U.S.C. § 1415(b)(1)(C) 6
20 U.S.C. § 1415(b)(2) 3, 6
20 U.S.C. § 1415(c) 6
20 U.S.C. § 1415(d) 6
20 U.S.C. § 1415(e)(2) 6, 12
20 U.S.C. § 1415(e)(4) 12
20 U.S.C. § 1415(e)(4)(B) 7
20 U.S.C. § 1415(e)(4)(D) 7
20 U.S.C. § 1415(e)(4)(E) 7
20 U.S.C. § 1415(e)(4)(F) 7
20 U.S.C. § 1415(m) 7
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1654 . . . . . passim

1997 U.S.C.C.A. No. 5 (July 1997) 7

IN THE

Supreme Court of the United States

NO. 97-

WILLIAM J. DEVINE, THERESA DEVINE,
and JOHN DEVINE,
a minor by and through his parents,
William J. Devine and Terry Devine,

Petitioners,

v.

INDIAN RIVER COUNTY SCHOOL BOARD,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

William Devine, Theresa Devine and John Devine petition the Court to grant the writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 121 F.3d 576, and appears in the Appendix to this Petition ("Pet. App.") at 1a to 23a. The district court denied petitioner's motion to proceed pro se in open court, and denied a renewed motion by written order. These rulings are not reported, and appear at Pet. App. 24a-26a.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1654 provides as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, are permitted to manage and conduct causes therein.

Section 615 of the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1415, is set forth at Pet. App. 27a-Pet App.37a.

STATEMENT

Petitioner John Devine is the autistic child of petitioners William J. Devine and Theresa Divine. When this dispute arose, John Devine attended the public schools operated by respondent Indian River County School Board. Respondent acknowledged that John Devine was a disabled child under the IDEA, and sought to craft an individual education program ("IEP"), as required by the statute, for the 1992-93 school year. Petitioners believed that John required more than the daytime schooling that he could receive in the public school, and requested a residential placement, preferably at a school that he had attended before the

family had moved to Florida. When respondent denied this request, petitioners initiated a due process hearing as provided by 20 U.S.C. § 1415(b)(2); in the course of that hearing, petitioners were represented pro se by petitioner William Devine, although an attorney was brought into the proceeding at the final order stage. After a lengthy hearing, the hearing officer ruled on September 21, 1993, that the IEP was insufficient because it failed to address John's developmental difficulties after school hours, and ordered respondent to revise the IEP accordingly. However, the hearing officer declined to find that a residential placement was required to achieve that objective.

In the course of discussions between the parties about settlement of the dispute, respondent sought review of the administrative decision by suing petitioners in Florida state court. Petitioners removed that action, and, on October 21, 1993, filed this case in the United States District Court for the Southern District of Florida, seeking extended eligibility for John under the IDEA, residential placement, and damages, fees and costs. Respondent counterclaimed, seeking reversal of parts of the order that required an IEP that increased its obligations. Petitioners were represented by an Oregon attorney, Robert Blackmore, who was admitted pro hac vice and associated local counsel as required by the local rules.

Although the IDEA provides that cases may be heard on the administrative record, respondent insisted upon having evidence introduced de novo, and, over petitioners' objection, the district court agreed. At the beginning of the second day of trial, February 21, petitioners advised the court that they wished to discharge Blackmore and proceed without counsel. Petitioner William Devine explained that counsel had been retained on a contingency basis on the understanding that the case would be heard on the administrative record, but that neither the law firm, nor petitioners, could afford the cost of a

de novo trial. Accordingly, he asked the court to permit his attorney to withdraw and to grant a continuance so that he could proceed pro se. The district court denied both motions and proceeded with the trial for the rest of the week, after which it adjourned the balance of the trial until July.

Petitioners filed a written motion to discharge their counsel and proceed pro se. On June 24, 1995, the district court denied this motion on the ground that the case was too complicated to permit pro se representation; counsel would be permitted to withdraw only when substitute counsel entered an appearance. Pet. App. 25a-27a. Petitioners appealed from this order, contending that in addition to the problem of cost, he had reason to be dissatisfied with the attorney's performance because he had missed hearings and come to other hearings unprepared.

The court of appeals affirmed. 121 F.3d 576, Pet. App. 1a-24a. The panel began by noting the unanimous position of every court of appeals to address the question, that the collateral order doctrine, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), authorizes jurisdiction of appeals from non-final orders denying pro se status. 121 F.3d 578-581. Turning to the merits, the court ruled that 28 U.S.C. § 1654 did not authorize petitioner William Devine to proceed pro se because that statute allows parties to conduct only "their own cases" personally, and the question was whether William could represent his son John. 121 F.2d at 581. Nor did the IDEA compel a contrary result, because although the statute allows a parent to sue on his child's behalf, it does not expressly authorize the parent to act as counsel in such suits. The court acknowledged that there were some reported cases where parents had proceeded pro se, but it opined that these cases did not stand for the proposition that pro se litigation was permitted because, the court stated, in each such case the parents were attorneys. *Id.* and note 18. Moreover, although the court recognized that the statute authorized parents to proceed pro se

in an administrative hearing, there was nothing to suggest that Congress intended that requirement to apply in federal court as well. *Id.* 581-582. One member of the panel dissented on jurisdictional grounds, *id.* 582-586, but agreed with the majority that the parents could not proceed *pro se*. *Id.* 586 n.7.

REASONS FOR GRANTING THE WRIT

The Decision Below Departs from the Widespread Practice of Permitting Parents to Pursue IDEA Cases Pro Se, and Presents an Important Question of Federal Law Because It Threatens to Make It Impossible for Most Parents to Contest Inadequate State IDEA Rulings or Even to Defend Their IDEA Victories in Federal Court

The Court should grant certiorari in this case because the decision below runs contrary to the general practice, in other federal district and appellate courts, of allowing parents to pursue IDEA cases in their own names and in the names of their children without counsel. The IDEA is structured in such a way that the rights of a disabled child are to pursued by his parents, in their own name or in the child's name; Congress and the courts have depended on parents to press their child's interests and have commanded the schools and the agencies to get the parents involved, on the assumption that parental notification is the best way to ensure maximum protection for the child. Moreover, the practicalities of IDEA litigation are such that, in many cases, the only parents who can obtain counsel are those who are rich enough to pay for the lawyer's time in advance. Thus, the main effect of the decision below will be to prevent parents who need to contest insufficient administrative findings — and even those whose victories in the administrative process are challenged in court by the local schools — will simply be unable to protect their children's interests in Court, thus undermining the effective enforcement of the IDEA.

1. The IDEA was enacted because "more than half of the children with disabilities in the United States do not receive appropriate educational services . . .." 20 U.S.C. § 1400(b)(3). To that end, the IDEA was enacted with the purpose of "assur[ing] that all children with disabilities have available to them . . . a free appropriate public education" and "that the rights of children with disabilities and their parents or guardians are protected . . .." 20 U.S.C. § 1400(c). Accordingly, Congress devised a system of funding special educational and evaluative procedures, 20 U.S.C. § 1411, and required states and localities that accept such funding to both create and utilize an elaborate plan for providing special education, identifying children who need special educational assistance, and determining what assistance each needs. 20 U.S.C. § 1412-1414.

The heart of the IDEA system, however, is the procedural safeguards that states and localities are required to accord to "children with disabilities and their parents or guardians" in order to assure "the provision of a free appropriate public education." 20 U.S.C. § 1415(a). Parents and guardians are given access to all relevant records, 20 U.S.C. § 1415(b)(1)(A); parents and guardians must be given full written notice in advance of any change (or refusal to change) a child's educational services, 20 U.S.C. § 1415(b)(1)(C); and parents and guardians are entitled to impartial due process hearings, first within the school system, and ultimately to a state agency, on any complaints they may have with the school district's actions. 20 U.S.C. §§ 1415(b)(2), 1415(c). At such hearings, the parents may be represented either by counsel or by lay representatives, 20 U.S.C. § 1415(d); or they may proceed pro se. *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58, 62 (3d Cir. 1988).

If either the parents or the school district is dissatisfied with the administrative decision, they may seek review in district court. 20 U.S.C. § 1415(e)(2). The court can order the school

district to modify the IEP or to reimburse the parents for enrolling their child in private school if the educational authorities failed to provide an appropriate education before that enrollment. Section 1412(a)(10)(C)(ii); *see also* 1997 U.S.C.C.A. No. 5 (July 1997), at 90. Section 1415 provides for awards of attorney fees if the parents or guardians are successful in the action, and repeatedly identifies the **parents** as the parties who are entitled to sue on behalf of their children. Sections 1415(e)(4)(B), 1415(e)(4)(D), 1415(e)(4)(E), 1415(e)(4)(F). The parents' rights all transfer to the child when he reaches the age of majority. Section 1415(m), *see also* 1997 U.S.C.C.A. No. 5 (July 1997), at 122. In each of these subsections, the IDEA makes clear that a suit under the IDEA is the parents' "own case," albeit one brought to protect their interests of their children.

This Court and many lower courts have construed the IDEA as depending on an enforcement scheme in which parental representation of children's interests is the linchpin. Section 1415 has been described as a "generous bill of rights for parents . . . who wish to contest the evaluation and placement policies of educational authorities." *Stemple v. Board of Educ. of Prince George's Cy.*, 623 F.2d 893, 898 (4th Cir. 1980). The section attempts to ensure the detailed involvement of parents and guardians as the means by which the appropriate education of the child will be achieved. *Burlington School Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 370 (1985); *Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 82 (3d Cir. 1996). It is notice to the parents and guardians that triggers the administrative procedure. *Jackson v. Franklin Cy. School Bd.*, 806 F.2d 623, 629-630 (5th Cir. 1986). Absent such notice the state cannot take advantage of failure to exhaust the proper administrative procedures or alleged waiver of rights under the section, *Mrs. C. v. Wheaton*, 916 F.2d 69, 74 (2d Cir. 1990); and a parent's procedural errors in the administrative scheme are

attributed to the child even if suit is brought in the child's name. *Johnson by Johnson v. Duneland School Corp.*, 92 F.3d 554, 558 (7th Cir. 1996); *Abney by Kantor v. District of Columbia*, 849 F.2d 1491, 1497-1498 (D.C. Cir. 1988); *Stemple v. Board of Educ. of Prince George's Cy.*, 623 F.2d 893, 898 (4th Cir. 1980), *overruled on other grounds*, *Hall by Hall v. Vance*, 774 F.2d 629, 633 (4th Cir. 1985) (particular violation at issue does not constitute waiver). Ultimately, as this Court said in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 182 and n.6, 207, 208-209, (1982), parental involvement is the key to the enforcement of the statutory scheme. "[P]arents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled under the Act" by undertaking the complaint procedures, beginning with the administrative process and culminating, in appropriate cases, in proceedings in federal court. *Id.* at 209. *Accord*, *Honig v. Doe*, 484 U.S. 305, 311, 312 (1988).

Accordingly, when parents sue on behalf of their children under the IDEA, it is their own rights that they are invoking. Remedies are afforded to the parents to redress the violation of the child's rights. *Town of Burlington v. Massachusetts Dep't of Education*, 736 F.2d 773, 795-802 (1st Cir. 1984), *aff'd*, 471 U.S. 359, 370 (1985). The parents' and child's claims are so closely identified that if a parent who is a lawyer represents the child in litigation, the case is nevertheless treated as a pro se case in which fees must be denied pursuant to *Kay v. Ehrler*, 499 U.S. 432 (1991). *Rappaport v. Vance*, 812 F. Supp. 609, 611 (D. Md. 1993), *app. dism.*, 14 F.3d 596 (4th Cir. 1994). Accordingly, in terms of the language of 28 U.S.C. § 1654, litigation brought by parents on behalf of the child under the IDEA is "their own case," and they must be permitted to litigate that case pro se.

2. Section 35 of the Judiciary Act of 1789, 28 U.S.C. §

1654, protects the right of federal court litigants to "plead and conduct their own cases personally." This "is a right of high standing, not simply a practice to be honored or dishonored by a court depending on its assessment of the desiderata of a particular case. . . . The Founders believed that self-representation was the right of a free people." *O'Reilly v. New York Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982) (per Friendly, J.).

The right of self-representation under section 1654 is a personal one, in that a party is only entitled to conduct his "own case." Only natural persons may assert this right, *Rowland v. California Men's Colony*, 506 U.S. 194, 202 (1993), and a party may generally not be represented by another person who is not a lawyer. Nevertheless, the cases make clear that in deciding whether to allow pro se representation on the plaintiff's "own case," it is necessary to be sensitive to the specific right that is being asserted. *Phillips v. Tobin*, 548 F.2d 408, 411 (2d Cir. 1976). Consequently, because of the way that certain statutes have structured the relevant legal relationships, there are occasions on which an individual has a specific interest in the right being asserted by another, and therefore section 1654 entitles the individual holder to appear personally to assert that right.[1] Similarly, section 1654 guarantees the right of self-representation to the actual holder of the right, even if the litigation is being conducted in the name of another. *Heiskell v. Mozie*, 82 F.2d 861, 862 (DCCA 1936). In this case, the Devine parents appeared to enforce rights under the IDEA

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[1] *Reshard v. Britt*, 819 F.2d 1573, 1582-1583 (11th Cir. 1987), *vacated pending en banc consideration*, 831 F.2d 222, *aff'd by equally divided court*, 839 F.2d 1499 (1988); *United States v. Reeves*, 431 F.2d 1187, 1188 (9th Cir. 1970); *Willheim v. Murchison*, 206 F. Supp. 733, 736 (S.D.N.Y. 1962), *app. dism.*, 312 F.2d 399 (2d Cir. 1963).

which they hold jointly with their child, *see supra* at 6-9, and which they may assert personally on behalf of their child. Consequently they are entitled to proceed pro se.

3. Their pro se effort is consistent with numerous decisions of the lower federal courts, in which parents represented their children or their children's interests as next friends in asserting rights under the IDEA.[2] The court below noted that some cases had been conducted pro se, and distinguished them on the ground that the parents were lawyers, 121 F.3d at 581 n.18; but none of the cases cited in footnote 2 involve parents who were appearing in their capacity as lawyers.[3] We are aware of only two cases, both in the district court, in which parents were precluded from proceeding on behalf of their children pro se; one does not appear to have been

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[2] *Krehnbrink v. Maryland Dep't of Educ.*, 1995 U.S. App. LEXIS 36124 (4th Cir.);*Muth v. Central Bucks School Dist.*, 839 F.2d 113, 115 (3d Cir. 1988), *rev'd on other grounds*, 491 U.S. 223 (1989); *Susan R.M. v. Northeast Independent School Dist.*, 818 F.2d 455, 457, 458 (5th Cir. 1987); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1308 (9th Cir. 1987); *Rettig v. Kent City Sch. Dist.*, 788 F.2d 328, 329 (6th Cir. 1986); *Kruelle v. New Castle Cy. School Dist.*, 642 F.2d 687, 688 (3d Cir. 1981), *aff'g*, 489 F. Supp. 169 (D. Del. 1980) (district court caption shows parents suing for themselves and as next friend); *Schreiber v. Ridgewood Bd. of Educ.*, 952 F. Supp. 205, 206 (D.N.J. 1997); *Stellato v. Board of Education*, 842 F. Supp. 1512, 1513 (N.D.N.Y. 1994); *Straube v. Florida Union Free Sch. Dist.*, 778 F. Supp. 774, 776 (S.D.N.Y. 1991); *Greene by Greene v. Harrisville Sch. Dist.*, 771 F. Supp. 1 (D.N.H. 1990); *Ahern v. Keene*, 593 F. Supp. 902, 904 and n.1 (D. Del. 1984) (one plaintiff was a lawyer, but not in the forum state).

[3] In *Ahern v. Keene*, 593 F. Supp. 902, 904 and n.1 (D. Del. 1984), one of the pro se plaintiffs was a lawyer, but not in the forum state.

pursued on appeal, *Lawson v. Edwardsburg Public School*, 751 F. Supp. 1257, 1258-1259 (W.D. Mich. 1990), and one was argued last month in the Third Circuit. *Collinsgru v. Palmyra Board of Education*, No. 96-457 (JBS) (May 7, 1996) (designated not for publication), *appeal pending*, No. 96-5807 (argued November 6, 1997).[4]

The cases allowing pro se representation have done so without expressly considering the issue, and so we cannot represent that there is a square conflict. However, the widespread practice of which we speak exists for a reason — the statute encourages it and the practicalities of IDEA litigation require it. Accordingly, if the decision below is allowed to stand, the practical impact will be to severely undermine the enforcement of the IDEA.

4. The practicalities of litigation under the IDEA also make pro se litigation a necessary part of the enforcement scheme. Because IDEA cases require a fair degree of specialized knowledge, there are only a limited number of attorneys who are available to represent parents and children contesting adverse administrative decisions. Litigating an IDEA case requires a lawyer to obtain a transcript of days or weeks of administrative hearings, to master that transcript and scores or even hundreds of exhibits, and to be prepared to present independent evidence, involving an arcane body of knowledge,

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[4] The First Circuit noted the issue in two related appeals but found it unnecessary to decide whether pro se representation was allowed because the decision below was affirmed. *Amman v. Town of Stow*, 991 F.2d 929, 935 (1993), *Amman v. Stow School System*, 982 F.2d 644, 648 n.2 (1992). These decisions are contrary to *Osei-Afriyie v. Medical College of Pennsylvania*, 937 F.2d 876 (3d Cir. 1991), which indicated that when cases are improperly conducted pro se, dismissal of claims with prejudice is error. The First Circuit thus actually allowed those appeals to be pursued *pro se*.

as the parents are entitled to do under 20 U.S.C. § 1415(e)(2). And yet, because the courts are required to give substantial deference to the substantive decisions made by the decision-makers in the administrative process, *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207-208 (1982), it is hard to find a lawyer who is willing to take on an IDEA case on a wholly contingent basis unless the case is close to being a sure winner. Thus, even though attorney fees may be awarded in a case where the plaintiffs are successful, 20 U.S.C. § 1415(e)(4), IDEA counsel, even more so than lawyers suing under other statutes authorizing awards of attorney fees, are likely to demand a very substantial up-front payment and an agreement for hourly compensation.

The proceedings below bear out this problem. Petitioners were able to find an attorney from Oregon to handle their case on a contingent basis. At trial the district judge refused to allow petitioners to rely on evidence contained in the administrative record, but insisted that each of the witnesses be presented in person. However, in entering the retainer agreement, petitioners and their counsel had expected that they were undertaking only an enhanced administrative review proceeding, inasmuch as the statute provides that "the court **shall** receive the records of the administrative proceedings [and] shall hear additional evidence **at the request of a party**," 20 U.S.C. § 1415(e)(2) (emphasis added). The district court's ruling transformed the case from one based on an administrative record to an entirely de novo trial, and vastly increased the time and the effort which petitioners' counsel was required to devote to the case, not to speak of the out-of-pocket costs in the case. Because the case was now quite different from the proceeding on which the original contingent fee arrangement was predicated, petitioners' counsel was unable to continue the representation and petitioners were compelled to ask to be allowed to proceed pro se so that they could complete the

presentation of the child's evidence.

And yet, by refusing to allow petitioners to proceed on the only basis on which they can afford to continue, the courts below have endangered the ability not only of these petitioners, but of all parents who desire to protect their children's IDEA rights but are neither indigent (thus qualifying for representation by legal services) not wealthy enough to advance an attorney's hourly rate in the hope of being reimbursed by an award of attorney fees. This devastating impact on the enforceability of the IDEA provides the most important reason why the Court should grant review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 4, 1997

APPENDIX

William J. DEVINE, Terry Devine, John Devine, a minor by and through his natural parents William J. Devine and Terry Devine,

Plaintiffs-Counter-Defendants-Appellants,

v.

INDIAN RIVER COUNTY SCHOOL BOARD, Defendant-Counter-Claimant-Appellee.

United States Court of Appeals,
Eleventh Circuit.

No. 95-4847.

Sept. 5, 1997.

Appeal from the United States District Court for the Southern District of Florida.

Before BARKETT, Circuit Judge, KRAVITCH, Senior Circuit Judge, and HARRIS, Senior District Judge.

KRAVITCH, Senior Circuit Judge:

William Devine ("Devine"), a non-lawyer, seeks to discharge his family's attorney and represent the interests of his child, John, in a lawsuit pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*

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* Honorable Stanley S. Harris, Senior U.S. District Judge for the District of Columbia, sitting by designation.

("IDEA").[1] The district court denied Devine's "Emergency Motion to Allow Withdrawal of Attorneys and Pro Se Appearance," filed on the second day of trial. We affirm.

I.

During the 1992-93 school year, the Devine family, including their autistic son John, resided within the Indian River County school district. Agreeing that John is a disabled child within the meaning of IDEA, entitled to a free, appropriate public education, the parties sought to craft an individualized education program ("IEP") for the school year. A dispute arose as a result of Devine's belief that John required more than the daytime schooling he received at Dodgertown Elementary School. Devine urged the school board to furnish a residential placement for John, preferably at the May Institute in Massachusetts.[2] The Indian River County school board denied such placement and the Devines requested a due process hearing, *see* 20 U.S.C. § 1415(b)(2), to challenge the board's IEP on several grounds. At the hearing, Devine represented his family by examining witnesses and presenting evidence. The hearing officer concluded that the IEP was insufficient, as it ignored John's developmental difficulties after school hours, but also ruled that a residential placement was unnecessary.

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[1] On June 4, 1997, President Clinton signed the Individuals with Disabilities Education Act Amendments of 1997. Its provisions do not affect the disposition of this case.

[2] John previously had been placed at the May Institute. The Devines lived in Massachusetts until moving to Florida in the fall of 1988.

Thereafter, the Devines commenced the instant action in the district court, seeking: (1) attorney's fees and costs as prevailing parties in the administrative proceeding;[3] (2) compensatory damages for expenses incurred as a result of the allegedly deficient IEP; (3) extended eligibility under IDEA; (4) general damages; and (5) prospective relief ordering residential placement at the May Institute.[4] From their initial complaint in October, 1993 until the second day of trial, February 21, 1995, the Devines were represented by counsel. For most of the proceedings, Robert Blackmore of Oregon served as the Devines' attorney, having been admitted *pro hac vice* and having associated with local counsel in accordance with the district court's order.

At the beginning of the day on February 21, Blackmore informed the court that Devine wished to discharge him as the family's attorney and to proceed with the trial unaided. Devine discussed the matter with the court, which then denied the motion. Trial proceeded until February 24, on which date the court recessed the trial to recommence July 27. Until this point, Devine apparently remained satisfied

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[3] *See* 20 U.S.C. § 1415(e)(4)(B). The record indicates that the Devines retained Robert Blackmore as their attorney for purposes of evaluating the hearing officer's proposed final order.

[4] The Devines moved to Massachusetts following the 1992-93 school year, and Massachusetts state and local school entities presently are paying for John's placement at the May institute. Devine represented at oral argument that he wishes to return to Florida, and have local instrumentalities in Florida assume the cost of paying for John's placement.

with Blackmore's performance.[5] On June 7, however, Devine moved the district court to allow Blackmore to withdraw and to allow Devine to proceed *pro se*, citing undisclosed differences. The court denied the motion and Devine filed a timely notice of appeal.

II.

As a threshold matter, we consider whether we have jurisdiction over a non-final order allegedly infringing a party's right to appear *pro se*.[6] The challenged order does not finally resolve the merits of the case, authorizing our review under 28 U.S.C. § 1291, nor is it one of the kinds of interlocutory orders from which an appeal may be taken pursuant to 28 U.S.C. § 1292(a). Further, the district court did not certify the order as presenting "a controlling question of law as to which there is a substantial ground for a difference of opinion," permitting appellate review under 28 U.S.C. §

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[5] In his brief, Devine states that "Blackmore did not adequately represent the interests of the Devines," citing Blackmore's failure to appear at a pretrial hearing and deficient performance at other unidentified hearings. Devine's February 21 colloquy with the district court, however, belies this claim and suggests that financial considerations motivated the request to proceed *pro se*.

[6] As is evident from section III, *infra*, we do not believe that Devine may proceed *pro se* on his son's behalf. The nature of the jurisdictional inquiry, however, requires us to assume for present purposes that he can. We note that Devine does not challenge the district court's order as it applies to his representation of his wife and himself. Thus, we think the order is best characterized — in order to assess jurisdiction — as one denying a motion to proceed *pro se* on John's behalf.

1292(b).[7]

Interlocutory jurisdiction only exists, then, if the challenged order fits within the narrow collateral order exception to section 1291's finality requirement. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).[8] To satisfy *Cohen*, a non-final order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978). We conclude that we have jurisdiction over non-final orders denying *pro se* status.

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[7] Although a motions panel of this court denied the school board's motion to dismiss the appeal for lack of jurisdiction, we may revisit that determination. *See* 11th Cir. R. 27-1(f)

[8] Our court has recognized that three exceptions to the finality requirement exist: (1) the collateral order doctrine; (2) the doctrine of practical finality; and (3) the exception for intermediate resolution of issues fundamental to the merits of the case. *In re: F.D.R. Hickory House, Inc.*, 60 F.3d 724, 725 (11th Cir.1995). Upon consideration, we are persuaded that only the first of these is arguably relevant to the instant appeal. The doctrine of practical finality, or the Forgay-Conrad rule, applies in cases involving property contests, *id.* at 726, and the final exception (first articulated in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964)), has been given a narrow construction. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n. 30, 98 S.Ct. 2454, 2462 n. 30, 57 L.Ed.2d 351 (1978) (describing *Gillespie* as permitting jurisdiction over "unsettled issue of national significance" when jurisdictional problem only identified late in the litigation; holds that "[i]f *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.").

The majority of courts to address this question have found that jurisdiction is proper. *Compare Reshard v. Britt*, 819 F.2d 1573 (11th Cir.) (holds order denying personal representatives of estate from representing estate *pro se* immediately appealable), *vacated*, 831 F.2d 222 (11th Cir.1987), *affirming district court by equally divided court*, 839 F.2d 1499 (11th Cir.1988) (en banc);[9] *C.E. Pope Equity Trust v. United States*, 818 F.2d 696 (9th Cir.1987) (without discussion, holds order striking trustee's *pro se* pleadings on behalf of trust immediately appealable) *and O'Reilly v. New York Times*, 692 F.2d 863 (2d Cir.1982) (holds order denying discharge of counsel and request to proceed *pro se* immediately appealable) *with Flora Constr.Co. v. Fireman's Fund Ins. Co.*, 307 F 2d 413 (10th Cir.1962) (without discussion, holds order denying motion to proceed *pro se* on behalf of corporation not immediately appealable), *cert. denied*, 371 U.S. 950, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963).

Precedent aside, we conclude that the order in the instant case fits neatly within the scope of the collateral order exception. First, the district court's order finally concluded the question of Devine's *pro se* appearance; it required Devine to appear through Blackmore or to retain appropriate

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[9] Our *Reshard* case was vacated so that the merits of the panel's decision could be reconsidered en banc. *See* 839 F.2d at 1500 (Tjoflat, J., dissenting) (noting reason for en banc consideration). On the merits, the en banc court could not reach a majority decision, resulting in the district court being affirmed by operation of law, and leaving no binding circuit precedent on point. Given the procedural posture of *Reshard* and its persuasive reasoning, however, the opinion informs much of our analysis.

alternate counsel[10] and did not suggest that Devine might later be able to take over the case himself.[11]

Second, the validity of the district court's order is separate from the merits of the underlying claim. Devine argues that he has a right to represent his son in federal court under 28 U.S.C. § 1654, Fed.R.Civ.P. 17(c), and IDEA. Thus, assessing the propriety of this interlocutory issue will turn on our interpretation of those statutes and rules. *See, e.g., DeSisto College, Inc. v. Line*, 888 F.2d 755, 763 (11th Cir.1989) (appeal challenging sanctions under Fed.R.Civ.P. 11 is separable from merits of underlying civil rights claim), *cert. denied*, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990); *Rives v. Franklin Life Ins. Co.*, 792 F.2d 1324, 1327 (5th Cir.1986) (appeal challenging disqualification of trustee requires interpretation of state statute regarding trustees and is separable from merits of underlying insurance dispute). Consequently, immediate review will not involve us in the subject matter of the lawsuit, namely, whether John was wrongly denied appropriate educational services. *Cf. Holt v.*

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[10] The order states: "The complexity of this action demands that Plaintiffs be represented by counsel. Therefore, counsel will be permitted to withdraw only where substitute counsel is named in the motion." Order of June 24, 1995.

[11] The order is therefore distinguishable from orders that do not reject conclusively a party's claimed right. For instance, in *Holt v. Ford*, 862 F.2d 850 (11th Cir.1989)(*en banc*), we found an order denying appointed counsel to an indigent § 1983 plaintiff was not a final rejection of a claimed right because the district court could reconsider its decision if the litigation proved to be more involved than initially anticipated. By contrast, as a case proceeds toward a conclusion with counsel, it is unlikely that a court will interrupt the proceedings to let a party represent himself/herself.

Ford, 862 F.2d 850, 853 (11th Cir.1989) (en banc) (order denying appointed counsel in *in forma pauperis* civil rights action not separable because decision to appoint counsel requires consideration of legal and factual complexity of case on the merits).[12]

The third prong of the *Cohen* analysis — that the order appealed from be effectively unreviewable after final judgment — gives us the most pause. Specifically, because the Supreme Court has limited interlocutory appeals of orders regarding representation, we question whether the instant appeal is untimely. In a trilogy of cases, the Court refused to permit immediate appeals of various orders involving disqualification of trial counsel. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (order denying motion to disqualify opposing counsel in civil case); *Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984) (order granting motion to disqualify defense counsel in criminal case); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985) (order granting motion to disqualify opposing counsel in civil case). These decisions suggest that representation-related orders are either fully reviewable on final appeal, thereby violating the un-reviewability prong of *Cohen*, or are subject to review for prejudicial error, thus requiring an appellate court to investigate the merits of the underlying dispute, in violation of *Cohen*'s separability requirement.[13]

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[12] Unlike the request for appointed counsel at issue in Holt, the right to proceed *pro se* does not depend on the factual or legal complexity of the case.

[13] For instance, in *Flanagan*, 465 U.S. at 268, 104 S.Ct. at 1056, the Court stated:

We conclude that the foregoing analysis is inapplicable to orders denying a party the right to proceed *pro se*. Although we recognize that a trial court's order requiring counsel is in part remediable after final judgment, given our "usual authority to vacate the judgment appealed from and order a new trial," *Firestone*, 449 U.S. at 378, 101 S.Ct. at 675, we believe that the right to represent one's self is effectively lost if not immediately vindicated. The harm in erroneously denying a party leave to proceed *pro se* is that it injures his/her dignity and autonomy, and this harm cannot be repaired after a judgment on the merits. *See McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 951, 79 L.Ed.2d 122 (1984) ("The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy.").[14] Moreover, this harm

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> [I]f establishing a violation of [petitioners'] asserted right requires no showing of prejudice to their defense, a pretrial order violating the right does not meet the third condition for coverage by the collateral order exception: it is not "effectively unreviewable on appeal from a final judgment."
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> If, on the other hand, petitioners' asserted right is one that is not violated absent some specifically demonstrated prejudice to the defense ... the second *Coopers & Lybrand* condition — that the order be truly collateral — is not satisfied.... Its validity cannot be adequately reviewed until trial is complete.

[14] Although *McKaskle* involved a criminal defendant's constitutional rights of self-representation, "the right to proceed *pro se* under 28 U.S.C. § 1654, is a fundamental stautory right that is afforded the highest degree of protection. It is a right which is deeply rooted in our constitutional heritage, and although statutory in origin, '[i]ts

exists quite apart from any prejudice a party might incur from trying his/her case with an unwanted attorney; that is, the affront to a litigant's right to conduct the case would persist even if the party were granted a new trial because of an erroneous denial of *pro se* status.[15]

An order denying self-representation is analogous to other orders courts have found immediately appealable. Specifically, orders denying a litigant leave to proceed *in forma pauperis* or denying intervention as of right fit within the collateral order exception. *Roberts v. United States Dist. Court for the N. Dist. of Cal.*, 339 U.S. 844, 845, 70 S.Ct. 954, 955, 94 L.Ed. 1326 (1950); *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 524-25, 67 S.Ct. 1387, 1390, 91 L.Ed. 1646 (1947). Each of these orders effectively closes the courthouse door to litigants. Similarly, an order prohibiting a party from appearing *pro se* will practically bar indigent litigants from prosecuting their cases.[16] *See Reshard*, 819 F.2d at 1580.

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constitutional aura is underscored by the proposal the very next day of the Sixth Amendment,' to the U.S. Constitution." *Reshard*, 819 F.2d at 1579 (quoting *United States v. Dougherty*, 473 F.2d 1113, 1123 (D.C. Cir. 1972)).

[15] *But see Flanagan*, 465 U.S. at 267-68, 104 S.Ct. at 1055-1056 (dicta) (implying non-appealability of erroneous denial of right to self-representation in criminal case).

[16] Thus, an order denying *pro se* status is distinguishable from one denying an *in forma pauperis* § 1983 or Title VII litigant appointed counsel, which we have held to be unappealable under *Cohen*. *Holt v. Ford*, 862 F.2d 850 (1989) (en banc); *Hodges v. Department of Corrections*, 895 F.2d 1360 (1990). An indigent party aggrieved by

In light of the foregoing, we conclude that the district court's order is effectively unreviewable on appeal from final judgment and, therefore, we have jurisdiction over this appeal.

III.

Turning to the merits of this appeal, we first conclude that neither 28 U.S.C. § 1654 nor Fed.R.Civ.P 17(c), cited by Devine, permits a parent to represent his/her child in federal court. Section 1654 authorizes parties in federal cases to "plead and conduct their own cases personally or by counsel," but is inapposite because it does not speak to the issue before us — whether Devine may plead or conduct his son's case.[17] Likewise, Rule 17(c) is unavailing; it permits authorized representatives, including parents, to sue on behalf of minors, but does not confer any right upon such representatives to serve as legal counsel. *See, e.g., Osei-Afriyie v. Medical College of Penn.*, 937 F.2d 876, 882-83 (3d Cir.1991) (neither section 1654 nor Rule 17(c) permits non-lawyer parent to represent child in federal court); *Cheung v. Youth*

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the former order cannot advance his/her case, but one harmed by the latter order can (by appearing *pro se*).

[17] We note that Devine is also a plaintiff in this matter. Thus, section 1654 permits him prosecute his own case in district court without benefit of counsel, in appropriate circumstances. *See Cross v. United States*, 893 F.2d 1287, 1291 n. 10 (11th Cir.)(dicta) (denial of "eleventh hour" request to proceed *pro se* may be appropriate), *cert denied*, 498 U.S. 849, 111 S. Ct. 138, 112 L.Ed.2d 105 (1990); *O'Reilly v. New York Times Co.*, 692 F.2d 863, 867 (2d Cir.1982) (request to proceed *pro se* must be timely, whether made in criminal or civil case).

Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir.1990) (same); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir.1986) (same).

We also cannot agree with the argument that IDEA compels a contrary result in this case. First, Devine cites two cases, *Mountain View--Los Altos Union High Sch. Dist. v. Sharron B.H.*, 709 F.2d 28 (9th Cir.1983), and *Vander Malle v. Ambach*, 673 F.2d 49 (2d Cir.1982), for the proposition that IDEA accords parents the right to bring actions on behalf of their disabled children. We agree with the proposition, but it is irrelevant to the present inquiry; like Rule 17(c), IDEA allows parents to sue in their children's stead, but does not authorize them to act as counsel in such a lawsuit. We are aware of no authority permitting non-lawyers to represent their children *pro se* in cases brought pursuant to IDEA.[18]

Devine's second IDEA claim is that the statute and regulations promulgated thereunder authorize parental representation. Although it is true that parents have the right to present evidence and examine witnesses in due process hearings held pursuant to IDEA, *see* 20 U.S.C. § 1415(d)(2); 34 C.F.R. § 303.422(b)(2), there is no indication that Congress intended to carry this requirement over to federal court proceedings. In the absence of such intent, we are

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[18] The published cases under IDEA (and its precursor, the Education for All Handicapped Children Act) involving *pro se* represntation by parents are distinguishable from the present case because they involved parents who were attorneys. *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 275 (D.C. Cir.1993)(lawyer-father represented family in *pro se* action), *cert denied*, 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 71 (1994); *Rappaport v. Vance*, 812 F.Supp. 609, 612 (D.Md.1993) (same), *appeal dismissed*, 14 F.3d 596 (4th Cir.1994); *Ahern v. Keene*, 593 F. Supp. 902, 904 n. 1 (D.Del.1984) (same).

compelled to follow the usual rule--that parents who are not attorneys may not bring a *pro se* action on their child's behalf--because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents.[19]

IV.

Accordingly, the order of the district court denying Devine's motion to represent his son is AFFIRMED.

HARRIS, Senior District Judge, dissenting:

I respectfully dissent from the majority's conclusion that we have jurisdiction over an interlocutory order denying a party leave to represent his child pro se. I agree with the majority that we may not review such an order pursuant to the statutory provisions of 28 U.S.C. § 1291 or 28 U.S.C. § 1292 (a) or (b). However, I cannot agree that the collateral order exception confers jurisdiction upon us in this case.

As the majority notes, the collateral order doctrine is a narrow exception to the finality requiremen t of 28 U.S.C. § 1291. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949). The Supreme Court has emphasized the importance of the final judgment rule and the consequent rarity with which departures from it are

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[19] For instance, we note that the school board in this case moved the district court to dismiss the Devine's action on abstention grounds. The Devines, through counsel, responded and succeeded in avoiding dismissal. A non-lawyer parent, though perhaps the most competent person to present evidence relevant to his/her child's disability at a due process hearing, would be ill-equipped to contest a motion based on such a difficult issue.

appropriate. *Flanagan v. United States*, 465 U.S. 259, 265, 104 S.Ct. 1051, 1055, 79 L.Ed.2d 288 (1984) ("The importance of the final judgment rule has led the Court to permit departures from the rule "only when observance of it would practically defeat the right to any review at all.' " (internal citation omitted)).[1] In order to fit within the strict confines of the collateral order doctrine, a non-final order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) (internal citations omitted). An order denying a party's motion to proceed *pro se* on behalf of his child fails to meet the third element of the *Coopers & Lybrand* test, *i.e.*, that the order be effectively unreviewable on appeal from a final judgment.

In order to satisfy the third prong of the collateral order doctrine, an appellant must demonstrate that "denial of immediate review would render impossible any review whatsoever." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376, 101 S.Ct. 669, 675, 66 L.Ed.2d 571 (1981) (internal citation omitted). This requirement is met where "the legal and practical value of [the asserted right] would be destroyed if it were not vindicated before trial." *Id.* at 377, 101 S.Ct. at 675

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[1] In *Flanagan*, the Supreme Court stated:

> The final judgment rule serves several important interests. It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice. (*Id.* at 263-64, 104 S.Ct. at 1054.)

(internal citation omitted). Unless an order "represent[s] a final rejection of a claim of a fundamental right that cannot effectively be reviewed following judgment on the merits," the Court has concluded that it does not fall within the small class of cases which meet the third requirement of the collateral order doctrine. *Id.*, at 377, 101 S.Ct. at 675.

Although the Supreme Court has not directly addressed the issue of whether the denial of leave to proceed *pro se* is immediately appealable, it has consistently rejected such interlocutory appellate jurisdiction in the analogous area of orders which implicate a party's right to the choice of counsel. The Court has "strictly applied [the collateral order doctrine] test when parties pursued immediate appeal of trial court rulings on motions to disqualify counsel." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985). *See Flanagan*, 465 U.S. at 269, 104 S.Ct. at 1057; *Firestone*, 449 U.S. at 379, 101 S.Ct. at 676.

In *Firestone*, the Court held that an order denying a motion to disqualify opposing counsel in a civil case was not subject to interlocutory appeal because it was reviewable upon a final judgment in the underlying litigation. *Firestone*, 449 U.S. at 379, 101 S.Ct. at 676. The Court noted that if, upon review of the order after final judgment in the case, the order were determined to be erroneous, any prejudice could be remedied by vacating the judgment and ordering a new trial. *Id.* at 377-78, 101 S.Ct. at 675.

In *Flanagan*, the Court held that an order disqualifying a criminal defendant's counsel was not immediately appealable under the collateral order doctrine. 465 U.S. at 270, 104 S.Ct. at 1057. The Court stated:

> Petitioners correctly concede that postconviction review of a disqualification order is fully effective to the extent that the asserted

> right to counsel of one's choice is like, for example, the Sixth Amendment right to represent oneself. Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.... In sum, as petitioners concede, if establishing a violation of their asserted right requires no showing of prejudice to their defense, a pretrial order violating the right does not meet the third condition for coverage by the collateral-order exception: it is not "effectively unreviewable on appeal from a final judgment." (*Id.* at 267-68, 104 S.Ct. at 1056 (internal citations omitted).)

Alternatively, the Court noted that if a specific showing of prejudice were required to demonstrate a violation of petitioners' asserted rights, the challenged order would fail the second prong of the collateral order doctrine test — separability from the merits of the case. *Id.* at 268-69, 104 S.Ct. at 1056-57. Accordingly, regardless of whether petitioners were required to demonstrate prejudice in order to show a violation of their asserted right, the order would not satisfy the collateral order doctrine.

Finally, in *Richardson-Merrell,* the Court held that an order disqualifying counsel in a civil case was not subject to interlocutory appeal under the collateral order doctrine. *Richardson-Merrell,* 472 U.S. at 440-41, 105 S.Ct. at 2766. The Court rejected the lower appellate court's attempt to distinguish the *Flanagan* Court's analysis of the prejudice question on the grounds that the *Flanagan* decision dealt with

a criminal case.[2] Instead, the Court adopted the *Flanagan* analysis with regard to prejudice: "If a showing of prejudice is a prerequisite to reversal, then the ruling is not "completely separate' from the merits because it cannot be assessed until a final judgment has been entered; on the other hand, if a showing of prejudice is not required, then the ruling can be effectively reviewed on appeal of the final judgment." *Richardson-Merrell*, 472 U.S. at 436-37, 105 S.Ct. at 2764 (citing *Flanagan*, 465 U.S. at 267-69, 104 S.Ct. at 1055-57). Accordingly, the Court held that orders disqualifying counsel in civil cases are not collateral orders subject to interlocutory appeal. In doing so, the Court recognized the financial hardship that such a ruling might impose on a litigant, but declined "to "transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291.' " *Id.* at 440, 105 S.Ct. at 2766 (internal citation omitted).

Reviewing those Supreme Court precedents, it seems clear that an order denying a party leave to proceed *pro se* does

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[2] The Court of Appeals had taken the position that *Flanagan* strictly applied the final judgment rule and very narrowly applied the collateral order exception because of the criminal nature of the case. Concluding that the *Flanagan* Court's focus in denying interlocutory appellate jurisdiction had been on the potential for delay inherent in the grant of an interlocutory appeal, the lower court noted that delay is a much more severe problem in the criminal context than in the civil context. Rejecting this attempt to distinguish *Flanagan*, the *Richardson-Merrell* Court stated that "[a]lthough delay is anathema in criminal cases, it is also undesirable in civil disputes, as the Court of Appeals itself recognized. One purpose of the final judgment rule embodied in § 1291 is to avoid the delay that inherently accompanies time-consuming interlocutory appeals." 472 U.S. at 433-34, 105 S.Ct. at 2762. It is apparent that the same risk of delay about which the *Richardson-Merrell* Court was concerned in the disqualification of counsel context is present here as well.

not fall within the narrow class of rulings which are immediately appealable under the collateral order doctrine.[3] The Supreme Court concluded in both *Flanagan* and *Richardson-Merrell* that "if a showing of prejudice is not required, then the ruling can be reviewed on appeal of the final judgment." *Richardson-Merrell*, 472 U.S. at 437, 105 S.Ct. at 2764 (citing *Flanagan*, 465 U.S. at 267-69, 104 S.Ct. at 1055-57). Accordingly, such an order would fail to satisfy the third prong of the *Coopers & Lybrand* test and, thus, would not be subject to interlocutory appeal. In

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[3] The majority cites three circuit cases in support of its conclusion that an order of the type at issue is immediately appealable. *Reshard v. Britt*, 819 F.2d 1573, 1580-81 (11th Cir.1987), *vacated*, 831 F.2d 222 (11th Cir.1987) (*en banc*); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir.1987); *O'Reilly v. The New York Times Co.*, 692 F.2d 863, 866-67 (2d Cir.1982). However, none is persuasive.

Reshard, on which the majority essentially bases its analysis, was vacated by the *en banc* court and therefore is not binding. *C.E. Pope Equity Trust* simply concludes without discussion that an order denying a petitioner the right to proceed *pro se* fits within the collateral order doctrine and is immediately appealable. *Id.* at 697. Primarily, *O'Reilly* based its holding of immediate appealability on the difficulty which an appellant would have in demonstrating that prejudice resulted from an erroneous order upon review of a final judgment. *O'Reilly*, 692 F.2d at 866-67. However, *Richardson-Merrell*, which was decided after *O'Reilly*, makes it clear that if a petitioner must demonstrate prejudice in order to obtain reversal of an order violating an asserted right, then the order at issue violates the separability prong of the *Coopers & Lybrand* test and if prejudice is not a prerequisite to obtaining reversal, then the unreviewability prong of the test is not satisfied. *Richardson-Merrell*, 472 U.S. at 436-37, 105 S.Ct. at 2764-65. Indeed, the *Reshard* panel (again, whose opinion was vacated) acknowledged that much of *O'Reilly*'s reasoning had been undercut by *Richardson-Merrell*. *Reshard*, 819 F.2d at 1579.

Flanagan, the Court stated that obtaining reversal for the violation of the Sixth Amendment right to represent oneself "does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Flanagan*, 465 U.S. at 268, 104 S.Ct. at 1056 (citation omitted). Thus, an order violating the Sixth Amendment right to represent oneself is reviewable upon a final judgment and is not properly subject to interlocutory appeal.

Although the right to proceed *pro se* in the civil context is statutory, rather than constitutional as is the Sixth Amendment right discussed in *Flanagan*, the same interests would be harmed by an erroneous order denying a party leave to proceed *pro se*.[4] As the majority notes, such an order harms what has been characterized as a party's autonomy and dignity interests. *See McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 951, 79 L.Ed.2d 122 (1984) (noting that the Sixth Amendment right to appear *pro se* in a criminal case "exists to affirm the accused's individual dignity and autonomy.") In *Flanagan*, the Court recognized that the right to proceed *pro se* encompasses not only a due process concern but an independent autonomy interest as well. *Flanagan*, 465 U.S. at 267-68, 104 S.Ct. at 1056. The Court concluded, however, only that such an independent interest would exempt a petitioner from a required showing of prejudice in order to obtain reversal. *See McKaskle*, 465 U.S. at 177, n. 8, 104 S.Ct. at 951, n. 8 (noting that a denial of the right to proceed *pro se* is not amenable to harmless error analysis because "[t]he right is either respected or it is not."). *See also Faretta v. California*, 422 U.S. 806,

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[4] It should be borne in mind that there is more than a little artificiality here, in that the crux of this case is Devine's desire to dismiss retained counsel and represent his own son.

836, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975) (stating that there is no need to evaluate a *pro se* party's mastery of legal procedure because such an assessment is not necessary to determine whether a criminal defendant knowingly exercised his right to proceed *pro se*). The Court did not conclude that such an independent interest would justify interlocutory appellate jurisdiction on the ground that the interest would otherwise be destroyed. Indeed, the Court stated just the opposite — that where prejudice need not be shown for reversal, the final prong of the *Coopers & Lybrand* test is not satisfied. *Flanagan*, 465 U.S. at 267-68, 104 S.Ct. at 1056.

Furthermore, the autonomy interest in proceeding *pro se* identified by the majority is particularly weak — indeed, if present at all — in this case because, as noted, appellant William Devine is not requesting the right just to represent himself, but is seeking to represent his son *pro se*. The majority rather uniquely assumes for the purposes of its jurisdictional analysis that Devine has such a right. However, that assumption is inappropriate because the autonomy interest-which the majority asserts makes the challenged order unreviewable upon final appeal and catapults it into the narrow confines of the collateral order exception--clearly depends upon whether appellant Devine has any right to represent his son *pro se*. A party unquestionably has a right to appear *pro se* in his own case, but has no right to appear in effect as an attorney on the behalf of someone else. *C.E. Pope Equity Trust*, 818 F.2d at 697. I agree with the majority's conclusion in Part III of its opinion that neither the Federal Rules of Civil Procedure nor the IDEA create an exception to this general rule. Accordingly, appellant William Devine simply has no autonomy interest in proceeding

pro se on behalf of his son.[5]

The majority next takes the position that the denial of the motion of William Devine to proceed *pro se* affects an interest separate from the dignity and autonomy interest identified above, namely, an interest in access to the judicial system. The majority equates an order denying leave to proceed *pro se* with orders denying leave to proceed *in forma pauperis* and denying intervention as of right — both of which are subject to interlocutory appeal — because each of the three supposedly "closes the courthouse door" to non-prevailing litigants. *See Roberts v. United States Dist. Court for the N. Dist. of Cal.*, 339 U.S. 844, 845, 70 S.Ct. 954, 955, 94 L.Ed. 1326 (1950) (per curiam) (permitting without discussion interlocutory review under the collateral order exception of an order denying a party *in forma pauperis* status); *Brotherhood of R.R. Trainmen*, 331 U.S. 519, 524-25, 67 S.Ct. 1387, 1390 (permitting interlocutory appeal of an order denying intervention as of right).[6]

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[5] I recognize that this is somewhat of a contradiction in terms, but that is how it is dealt with by the majority.

[6] The persuasive nature of these cases in the *pro se* context is severly limited. First, both opinions were written long before the currently controlling three-prong test was established by *Coopers & Lybrand*. *Brotherhood of R.R. Trainmen* was decided prior to *Cohen*, which formally established the collateral order exception, and *Roberts* was decided only a year after *Cohen*. It also should be noted that the district court in *Brotherhood of R.R. Trainmen* "allowed an appeal ... from its order denying intervention," an action which suggests a somewhat different basis of appellate authority than that which would later become the collateral order doctrine. *Brotherhood of R.R. Trainmen*, 331 U.S. at 523-524, 67 S.Ct. at 1389. Additionally, although the Court determined that it had jurisdiction because the denial of intervention as of right was sufficiently final to permit appeal, the Court did not explicitly apply the principles which later would be

I also find unpersuasive the majority's assertion that an expansion of the collateral order doctrine is necessary because orders denying leave to proceed *pro se* "will practically bar indigent litigants from prosecuting their cases." Op. at 3303 (citing the vacated *Reshard* opinion, 819 F.2d at 1580). The majority takes the position that an indigent litigant's interest in access to the judicial system necessarily and finally would be destroyed by an order denying leave to proceed *pro se*. This simply is not so (and here, of course, there has been no determination that Devine is indigent). A trial court may appoint counsel or, where there is existing counsel, require counsel to continue representation of the presumably newly indigent party. Finally, an indigent party may be able to obtain *pro bono* representation on his own. Accordingly, appellants' interest in access to the judicial system does not provide a valid basis for the application of the collateral order exception.

In sum, I believe that an order denying the right to proceed *pro se* does not fall within the collateral order exception

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established in *Cohen*. *Id.*, at 523-25, 67 S.Ct. at 1389-90. For instance, there is no discussion of a separability requirement as there is in *Cohen*. Furthermore, the *Roberts* Court simply asserts without discussion that orders denying *in forma pauperis* status are immediately appealable under the collateral order exception. *Roberts*, 339 U.S. at 845, 70 S.Ct. at 954. Neither of these opinions, which were written in the embryonic stage of the collateral order doctrine, provides clear guidance as to the application of the doctrine.

In contrast, the Supreme Court precedent relied on in this dissent details its application of the *Coopers & Lybrand* test. These later opinions emphasize the importance of the final judgment rule and the consequent narrowness of the collateral order doctrine. The same concerns regarding judicial economy, the independence of the trial court, and delay which compelled the Court to reject the expansion of the collateral order doctrine to include interlocutory appeal of disqualification orders assuredly are relevant in the *pro se* context.

because it fails the third prong of the *Coopers & Lybrand* test, which requires that the order immediately destroy a fundamental right which cannot be rectified upon review of a final judgment. Supreme Court precedent in the analogous area of orders affecting litigants' autonomy interests in choosing their own counsel dictate that such orders do not satisfy the *Coopers & Lybrand* test. There is no reason why the same conclusion should not be reached regarding the autonomy interest in self-representation which would be affected by the denial of leave to proceed *pro se*. Moreover, here the petitioning party has no autonomy interest at stake since he does not seek the right to represent himself, but rather a third person, albeit his son. Finally, there is no merit to the argument that the denial of leave to proceed *pro se* destroys the petitioning party's interest in access to the judicial system since such an order does not necessarily preclude the acquisition of representation through other means. Accordingly, I conclude that an order denying leave to proceed *pro se* is reviewable upon review of a final judgment and that the collateral order doctrine does not apply. Hence, I respectfully dissent, believing that we should dismiss this case for lack of jurisdiction.[7]

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[7] Assuming arguendo that the majority is correct in its jurisdictional analysis, I would concur in Part III of the majority opinion, affirming the trial court's order.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

93-14209-CV-NCR
93-14209-CV-NCR
Volume 2

WILLIAM DEVINE, et al.,

Plaintiff,

vs.

INDIAN RIVER SCHOOL BOARD,CASE NUMBER:
etc., et. al.,

Defendants.

Transcript of proceedings before the Honorable Norrman C. Roettger, Chief United States District Judge, at Fort Pierce, Florida, on the 22nd day of February, 1995.

***

MR. BLACKMORE: Your Honor, my client would like to proceed in this case without representation. And I make a motion for withdrawal as counsel.

THE COURT: Is there a motion for you to withdraw in writing?

MR BLACKMORE: Pardon?

THE COURT: Are you making a motion? Do you have a

motion in writing?

MR. BLACKMORE: I do not have a motion in writing, your Honor.

THE COURT: Well, you are proceeding on an ore tenis basis.

***

THE COURT: I am not going to grant Mr. Blackmore's motion to withdraw.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 93-14202-CIV-ROETTGER
Case No.: 93-14209-CIV-ROETTGER

WILLIAM DEVINE, et al.,

Plaintiffs,

v.

INDIAN RIVER SCHOOL BOARD,

Defendant.

ORDER ON COUNSEL'S MOTION TO WITHDRAW

THIS CAUSE is before the Court on Plaintiffs' motion for an order allowing Robert F. Blackmore to withdraw as counsel of record for Plaintiffs in this cause. Plaintiffs seek to proceed in this matter pro se. Upon consideration of the motion and the record in this cause, it is

ORDERED AND ADJUDGED that Plaintiffs' motion for withdrawal of Mr. Blackmore as their counsel of record is hereby denied. The complexity of this action demands that Plaintiffs be represented by counsel. Therefore, counsel will be permitted to withdraw only where substitute counsel is named in the motion.

DONE AND ORDERED this 24 day of June, 1995.

Norman C. Roettger
Chief United States District Court Judge

20 U.S.C. §1415 provides:
§ 1415. Procedural safeguards

(a) Establishment of procedures. Any State educational agency, State agency, or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures. The procedures required by this section shall include--

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency--

(A) proposes to initiate or change; or

(B) refuses to initiate or change; the identification, evaluation, or educational placement of the child, in accordance with subsection (c), or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation in accordance with subsection (e);

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)--

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include--

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice. The notice required by subsection (b)(3) shall include--

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency

considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.].

(d) Procedural safeguards notice.

(1) In general. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum--

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6).

(2) Contents. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to--

[omitted]

(e) Mediation.

(1) In general. Any State educational agency or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k).

(2) Requirements. Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process--

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part [20 USCS §§ 1411 et seq.]; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with--

(i) a parent training and information center or community parent resource center in the State established under section 682 or 683 [20 USCS § 1482 or 1483]; or

(ii) an appropriate alternative dispute resolution entity; to encourage the use, and explain the benefits, of the mediation process to the parents.

[details omitted]

(f) Impartial due process hearing.

(1) In general. Whenever a complaint has been received

undersubsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

[subsections (2) and (3) omitted]

(g) Appeal. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 617(c) [20 USCS § 1417(c)] (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 612(a)(21) [20 USCS § 1412(a)(21)]).

(i) Administrative procedures.

(1) In general.

(A) Decision made in hearing. A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2) of this subsection.

(B) Decision made at appeal. A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action.

(A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements. In any action brought under this paragraph, the court--

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees.

(A) In general. The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees. In any action or proceeding

brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(C) Determination of amount of attorneys' fees. Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if--

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees. Except as provided in subparagraph (G), whenever the court finds that--

(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7); the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees. The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting.

[omitted]

(6) Parent appeal.

(A) In general.

(i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

[details omitted]

(7) Placement during appeals.

(A) In general. When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

[details omitted]

(8) Protections for children not yet eligible for special education and related services.

(A) In general. A child who has not been determined to be eligible for special education and related services under this part [20 USCS §§ 1411 et seq.] and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this part [20 USCS §§ 1411 et seq.] if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child

was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if--

(i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(ii) the behavior or performance of the child demonstrates the need for such services;

(iii) the parent of the child has requested an evaluation of the child pursuant to section 614 [20 USCS § 1414]; or

(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

[details omitted]

(m) Transfer of parental rights at age of majority.

(1) In general. A State that receives amounts from a grant under this part [20 USCS §§ 1411 et seq.] may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)--

(A) the public agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this part [20 USCS

§§ 1411 et seq.] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule. If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this part [20 USCS §§ 1411 et seq.].